United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2012

To be argued by
STEPHEN P. SAWYER

ORIGINAL

United States Court of Appeals
For the Second Circuit

UNITED STATES *ex rel.* JOSEPH MONTY,
Petitioner-Appellant,

against

ADAM F. McQUILLAN, Warden, Queens House of Detention for Men, Long Island City Branch, New York, N. Y.,
Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Preliminary Statement

Joseph Monty appeals from an order of the United States District Court for the Eastern District of New York (Orrin G. Judd, J.), entered December 19, 1974, dismissing his application for a writ of habeas corpus. *United States ex rel. Monty* v. *McQuillan,* 385 F. Supp. 1308 (E.D.N.Y. 1974).

Statement of the Case

On June 1, 1973, the appellant, Joseph Monty, was indicted by the Extraordinary Special Grand Jury for the County of Queens for the crimes of bribe receiving (2 counts), grand larceny in the first degree by extortion, attempted grand larceny in the first degree by extortion, conspiracy to commit grand larceny in the first degree by extortion and receiving reward for official misconduct (2 counts). All counts of the indictment related to corrupt dealings that appellant, as Chief Rackets Investigator of the Queens District Attorney's Office, had with Avis Rent-A-Car Systems, Inc. Prior to trial, the three counts relating to the crimes of grand larceny were dismissed and the two counts of bribe receiving were consolidated into one count.

The trial commenced on October 16, 1973, and on November 5, 1973, appellant was convicted of bribe receiving (N.Y. Penal Law §200.10) and one count of receiving reward for official misconduct (N.Y. Penal Law §200.25). On March 18, 1974, appellant was sentenced to an indeterminate term not to exceed four years on each conviction, sentences to run concurrently.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, appellant challenged the Trial Court's failure to disqualify itself, the failure to charge an Administrative Code violation as a lesser-included offense, the failure to charge bribe receiving and receiving reward for official misconduct as inconsistent crimes, the sufficiency of the evidence of bribe receiving, the Trial Court's definition of "official

misconduct," and the propriety of the cross-examination of the appellant.

The Appellate Division rejected these contentions and unanimously affirmed appellant's convictions. 45 A.D. 2d 1038 (2d Dept. 1974).

On August 5, 1974, Judge Harold A. Stevens of the Court of Appeals of the State of New York denied appellant's motion for leave to appeal to the Court of Appeals.

On September 6, 1974, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, denied appellant's motion for reargument.

On October 4, 1974, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. In his petition, appellant alleged that his trial before a specially appointed judge denied him due process and equal protection of the law under the Fourteenth Amendment and that his Sixth Amendment right to confrontation was violated by the admission of certain alleged hearsay testimony at trial.

Neither of these two claims was raised by appellant on his appeal to the Appellate Division. The latter claim was raised by appellant on a motion to reargue the decision of the Appellate Division. This motion was denied by the Appellate Division on September 6, 1974.

On October 31, 1974, appellant sought a writ of certiorari in the Supreme Court of the United States, pursuant to 28 U.S.C. §1257(3), to review the judgment of

the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Appellant's petition for certioriari raised the same issues as his application to the United States District Court for a writ of habeas corpus.

On December 16, 1974, appellant's petition for a writ of certiorari was denied by the United States Supreme Court. 95 S.Ct. 658 (1974).

On December 19, 1974, appellant's application for a writ of habeas corpus was dismissed by the United States District Court, Eastern District of New York (Judd, J.), 385 F.Supp. 1308 (E.D.N.Y. 1974). Judge Judd held that the designation of a particular justice to preside over an Extraordinary Term did not contravene requirements of due process nor deny equal protection of the law to appellant. Judge Judd also held that the use of testimony concerning statements made by a co-conspirator did not violate appellant's right of confrontation.

On January 9, 1975, Judge Judd issued, pursuant to F.R.A.P. 22(b), a Certificate of Probable Cause.

On January 13, 1975, appellant filed a notice of appeal in the United States Court of Appeals for the Second Circuit.

In the instant appeal, appellant again alleges that his trial before a specially appointed judge denied him due process and equal protection of the law under the Fourteenth Amendment and that his Sixth Amendment right to confrontation was violated by admission of certain alleged hearsay testimony at trial.

THE EVIDENCE AT TRIAL

The People's Case

Monty, as Chief Rackets Investigator, regularly recceived free cars from Avis Rent-A-Car during 1968-1972.

The appellant, Joseph Monty, was, during the period 1967-1972, the Chief Rackets Investigator of the Queens County District Attorney's Office (618-9*).

During this time appellant was in constant receipt of free cars from Avis Rent-A-Car Systems, Inc. (135-184; 372-3; 377). The evidence establishing the receipt by appellant of free cars was conclusive. From 1968 through November, 1971, he was given the free use on a monthly basis of a variety of new automobiles, including Plymouths, Dodges, Chryslers and a Cadillac (135-184). From November, 1971, through November, 1972, appellant was given the use of a 1972 Chevrolet Impala, which was registered in his own name (372-3; 377). The value of the use of these cars, were a person to have paid the applicable market rate, was calculated to have been several thousand dollars. For these cars Monty never paid any money (Peo. Exhs. 1-20; 377; 478; 597; 762).

Pursuant to an understanding between him and Avis Rent-A-Car, Monty, in return for free cars, performed valuable law enforcement services for Avis.

Collection of Bad Debts

Charles Napolitano, an Avis District Manager, testified that there was a regular procedure at Avis for collecting unpaid debts (119). First, the rental agent would

* References are to the state trial record.

make calls to the debtor (119). After that, the matter would be turned over to the Avis central collections department (119). If still uncollected, the matter went to an outside collection agency.

In early 1970 Napolitano had occasion to make use of Monty in a debt collection matter. Napolitano had a conversation with Ray Bonini, an employee working for him, concerning a collection problem involving a woman named Eleanor Modica (488). Mrs. Modica had rented several cars from Avis and had paid for the cars with bad checks (479). She had run up a debt to Avis of $1,093.88 over a period of two years (485). Avis had resorted to collection procedures within the company and then to outside collection agencies, all without success (479-80). After his conversation with Napolitano, Bonini called Monty and arranged to see him concerning the matter (488). He told Monty of Avis' unsuccessful collection efforts and that he wanted to prosecute Mrs. Modica, to which Monty responded affirmatively, advising him to bring over the material (489).

After Bonini's request for help in the Modica matter, appellant had Mrs. Modica brought into the District Attorney's Office (697-8). Appellant told her that he did not usually act as a collection agency and told her what she did was bad and that she could be prosecuted for it (699). He then asked her if she "wanted to go to jail" (699). Mrs. Modica replied that she did not (700). Appellant then told her that she could avoid going to jail if she paid Avis (700). At this point, appellant called Ray Bonini and asked him

to come down (492-3). After Bonini arrived, he asked him, in front of Mrs. Modica, whether he would be willing to forego prosecution if he received payment, to which Bonini assented (702-3; 493-4).

Appellant then gave Mrs. Modica thirty days to pay (703). During that thirty day period, around the July 4th weekend, someone representing himself as a detective from the District Attorney's Office called her and told her she had a date to come in and pay and not to leave town (706-7). Subsequently, Mrs. Modica came in to Monty's office with a check for the full amount owed Avis, which was given to Bonini (704-5; 498). At no time was Bonini asked to sign a criminal complaint (500). At no time was any civil action commenced against Mrs. Modica by Avis (706).

Later in 1970, Napolitano again had occasion to make use of Monty in another collection matter. In the middle of the year Napolitano learned of a debt of some $5,000, half in unpaid bills and half in bad checks, owed Avis by a man named Walter Halpern (197). This debt, which had been accumulating for over a year, had been given out to a collection agency without success (197). After learning of the Halpern situation, Napolitano called appellant and asked him to look into the matter, to which appellant agreed (202-3). At appellant's request, Napolitano delivered to him Halpern's unpaid rental agreements and bad checks (204).

Upon receiving from Napolitano the materials in the Halpern matter, Monty delegated the matter to Detective Murray Seliger (626-7). Seliger then called Halpern who

told him it was a civil, not a criminal matter and that the District Attorney's Office shouldn't be involved (788; 633). Monty relayed this information to Napolitano (209). Napolitano then inquired whether criminal charges could be preferred and, if so, whether collection was likely (209). Monty then told Napolitano that collection would be likely (210).

Subsequently, Halpern had a conversation with Seliger during which the amount of debt related to bad checks—$2,309—was totaled and given to him (791-2; 641; Peo. Exh. 28-C). Halpern was then told that he had been indicted and that to straighten it out he would have to pay Avis $3,000 with the balance of his debts in notes (790). Halpern asked whether $3,000 would "settle the entire indictment," to which Seliger replied that he would have to check with the foreman of the Grand Jury to find out if that would be sufficient to quash the indictment (791). Shortly thereafter Seliger said that Halpern would have to pay $3,000 and the balance in notes (791). Seliger denied this part of the transaction (647).

Halpern then went to his partner and borrowed $2,309 in the form of a certified check drawn on the Manufacturers Hanover Trust Company (792; Peo. Exh. 67). On March 25, 1971, Halpern brought the check to the District Attorney's Office and signed in to see Seliger (795; Peo. Exh. 68). He spoke to Seliger and to a Lieutenant Mahoney (797). Mahoney told Halpern that he was supposed to have come in with three thousand dollars (797-8). He said that the representative of Avis was in the next room and that

this thing could be straightened out if Halpern paid the $3,000 and signed for the balance (798). Mahoney also told Halpern that if he didn't pay by the next day he would be locked up (798).

Visitors sheets maintained by the District Attorney's Office for March 25, 1971, show that Halpern was there to see Seliger that day and that Charles Napolitano had signed in to see appellant (Peo. Exhs. 68, 82 and 83). Appellant's office was in the same small portion of the District Attorney's Office as Detective Seliger's room (1107-9). Seliger denied that Halpern visited him that day (647-8).

Subsequently, Halpern was arrested and charged with larceny and, eventually, after pleading guilty to a misdemeanor, was ordered by a court to pay Avis as a condition to his discharge (804A-808). This he did do, by giving Avis a check for $2,309 and the balance in notes (808; 217).

After Halpern's sentence, Napolitano went to appellant's office where appellant told him that he and his staff had worked hard on the case at which point Napolitano offered, without objection, to give petitioner $500 (218-20). Napolitano then discussed the payment with the collections manager at Avis who later advised him that such payments were illegal (223-6). Notwithstanding this advice, Napolitano, with the consent of his boss, Salvatore Giuffrida, cashed an Avis petty cash check for $500 (226-32; Peo. Exh. 31).

On September 8, 1971, Napolitano went to the District Attorney's Office and signed the visitors sheet to see appel-

lant (232-3; Peo. Exh. 32). Napolitano met appellant alone in his office and gave him $500 in cash in an envelope, which appellant took (234). That same day, appellant deposited $150 in cash in his account down the street from his office in Sterling National Bank (1137; Peo. Exh. 84).

Cancellation of Alarms

Alarms are orders put out to all police to be on the lookout for a car described therein which has been reported to have been stolen (121). An alarm may be placed by Avis because a car is actually stolen or because a customer failed to return the car (121). It may also be placed because personnel in the Avis central car control office have misplaced or misfiled records of a car (536-38). For whatever reason the alarm was placed, its prompt cancellation is of economic value to Avis since a vehicle rented while an alarm is outstanding on it could result in the arrest of a legitimate customer and a subsequent lawsuit against Avis (122).

Joanne Held, a rental agent, accompanied Fred Massaro to appellant's office, in the District Attorney's Office, where Massaro requested that an alarm on a stolen car be cancelled (575-9; Peo. Exh. 52). The cancellation was made by Monty (528-9).

On another occasion Richard Zaia, Avis car control manager, turned, through Fred Massaro of Avis, to Monty for the cancellation of alarms (553). In early 1970, Zaia requested help in cancelling some alarms from Massaro (543). After reporting that the alarms had been cancelled, Massaro told Zaia that his "Uncle Joe" (a reference to

appellant Monty) had cancelled the alarms (546). Avis' business records show at least one alarm listed as having been cancelled at that time by "Joseph Monty—D.A.'s Office Queens" (Peo. Exh. 55).

In February 1972, at the request of Salvatore Giuffrida, Monty cancelled several alarms for Avis by writing to the Police Department (Peo. Exh. 37).

Criminal Record Checks

A criminal record is a listing of all arrests a person has sustained (832). It is obtainable from the Identification Section of the New York City Police Department (832). The Identification Section is the only branch of the Police Department which keeps such records (834). While criminal records are confidential, the information may be obtained by a telephone call from a properly identified legitimate law enforcement official (838; 841). Once the official is properly identified, the information can be obtained by giving the Identification Section the name and date of birth of the subject of the inquiry (836-37). The use of the information, however, is limited to legitimate law enforcement purposes (841; Peo. Exhs. 78 and 78A).

Avis developed a need to obtain such information (716-18). The personnel department had to hire people who would handle money and who, therefore, had to be bonded (602; 714). Mary Elliott, Avis training manager, and a former rental agent, had a conversation with Gail Rachlin, a personnel manager for Avis (598; 715). In that conversation, Miss Elliott recommended appellant as some-

one who could help with the problem (600; 718). After the conversation, Miss Elliott called Monty and told him about the problem (602). Appellant said "fine" and offered to discuss the matter over lunch (602). Thereafter, appellant met with Miss Elliott and Miss Rachlin for lunch at the Elks Club (603; 721). At that lunch the two Avis representatives explained Avis' need for applicants' criminal records (604; 722). Appellant pointed out that he wasn't supposed to do that but agreed to obtain the information for Avis (604; 722-3).

After the luncheon appellant did, on several occasions, inform Miss Rachlin of the criminal records, if any, of prospective Avis employees (724-7). Miss Rachlin would call appellant and give him the subject's name and date of birth (724-5). Appellant would then call back with "exactly what the individual was involved in, if anything" (725).

In September, 1971, appellant and an Avis Zone Manager negotiated a continuation of the understanding under which appellant would continue to get a free Avis car in return for his continued availability to serve Avis.

In the summer of 1971, Avis Zone Manager Salvatore Giuffrida made a decision to discontinue giving appellant free cars (354). Shortly thereafter Giuffrida was contacted by Fred Massaro, who was about to leave Avis, concerning a continuation of the situation (355). Thereafter Giuffrida received several telephone calls from appellant himself which Giuffrida did not return (362). Eventually, Monty contacted him and a luncheon meeting was arranged (363-65).

Shortly thereafter appellant and Giuffrida met for lunch to discuss the free car arrangement (366-7). At that lunch, according to Giuffrida,

> "Monty specifically related to his past relationship with Avis Rent-A-Car and expressed a desire to continue that relationship, whereby he was helping us in different problems of collection, bad checks, placing alarms, removal of alarms, and in return he was looking for a complimentary car which he had been given in the past." (367).

Appellant also mentioned specifically a debt collection for which he took credit involving a woman, presumably Eleanor Modica (367). Giuffrida did not accept at once, but after consulting with Charles Napolitano on the matter, he agreed and gave appellant a new 1972 Chevrolet registered in appellant's own name in return for the continuing law enforcement favors from appellant (368; 371-3; Peo. Exh. 36).

After this meeting, appellant continued to render his services. In early 1972, Richard Zaia, Avis Car Control Manager, asked Giuffrida if he could contact Monty about cancelling some alarms (558). Giuffrida agreed and Monty was contacted (382-4). The alarms were then cancelled (Peo. Exhs. 37, 37A, 58B, 59A, 60A, 61A, 62A).

The Defendant's Case

Appellant claimed the free cars were a gift from Fred Massaro.

Appellant took the stand in his own defense and related how he had met Fred Massaro sometime in 1968 in the District Attorney's Office (900-05). He testified that two

months later, he contacted Massaro about buying an Avis Car (905-06). After a meeting with Massaro, he (Massaro) gave him a free car for a month (908-09). Massaro mentioned the problem he was having parking all the cars he controlled (908). After the month was up, the free car was renewed (912). Monty again asked to buy a car but Massaro again said he didn't have one available (911). In giving him another free car, this time Massaro told him that appellant's using the free car helped prevent its theft (912).

About a month later, appellant returned and again tried to buy a car (913). Massaro once more told him he didn't have one, but gave him another free car (913). The same thing happened again somewhere around September, 1968 (916). Again, Monty got a free car (918).

Throughout 1968, appellant continued to get a free car (918-19). Sometime in 1969, appellant stopped discussing buying a car (930). He admitted receiving a free car monthly for all of 1969 (923). He later admitted that the free cars continued uninterrupted until November, 1972 (930).

Throughout his testimony, appellant maintained that the only reason he got the four years of free cars was his friendship with Massaro. Several times when he picked up a car, he and Massaro had lunch or coffee and talked about their families (913; 916-17; 918; 919; 925; 927; 943-44). Massaro came to his home (931), introduced him to his superiors—Elkins, Elins and Napolitano (922), and called him "Uncle Joe" (922).

Appellant also developed a friendship with Charles Napolitano (928). On one occasion, he went to lunch with Napolitano and Massaro (927). Another time, Monty said that he went to lunch with Massaro, Napolitano and Salvatore Giuffrida, where families were discussed (944-45).

In 1971 Massaro called him and informed him that he was leaving Avis (977). Massaro then assured him that he would continue to get a free car (979-80). Appellant protested that he had to buy a car since then District Attorney Thomas Mackell had told him that an attorney for a defendant in Queens had informed one of Mackell's assistants of appellant's free car and planned to use it as leverage to get his client's case dismissed (986). Massaro then told appellant that he would contact Giuffrida and later told appellant to call Giuffrida (987). Appellant called Giuffrida and arranged a luncheon meeting (988-9).

Appellant stated that, when he met with Salvatore Giuffrida in September of 1971, he tried to give up the free car and buy one, but that Giuffrida insisted he continue to take a free car (992-93). Appellant told Giuffrida of Mackell's request that appellant get rid of his Avis car (992). Giuffrida then explained that he could give him a car with a private, not a rental plate (992). Monty said that this arrangement would be objectionable because his boss had insisted that he get rid of his complimentary car (992-93). Giuffrida then pointed out that the car would be registered in appellant's name (993). After added assurances that everything would be okay, appellant finally accepted the offer (993). He did not offer a reason for Giuffrida's insistence on giving him a free car.

Monty's Admissions and Denials

In addition to the receipt of free cars, appellant admitted to cancelling certain alarms for Avis (1124-25), although he said he did so only five times (998). He also said that he always had someone else cancel the alarms for him (998; 1155).

Appellant denied having discussed checks of criminal records at the luncheon with Mary Elliott and Gail Rachlin (938). He did admit, however, that he had caused checks of criminal records to be made for Avis, but claimed it only happened three times (999). These services he said were performed by others for him (999-1000).

He denied having gotten a "yellow sheet" (Identification Section record) from anyone (934; 968). He denied knowing whether the Identification Section was contacted (999; 1000).

Monty admitted to having been involved in the Modica transaction, but denied that he was asked to collect the debt (984; 954-55; 1090-92). He admitted to having been involved in the Halpern transaction but again denied that anyone asked him to collect (955-56; 1095). He denied having been told by Seliger about Seliger's first conversation with Halpern (959). He also denied having told Napolitano of this conversation (1097-98). He denied recalling whether Charles Napolitano came to see him on March 25, 1971 (1123). He also denied that he had taken the $500 cash from Napolitano (975; 1141).

Appellant denied that, at the luncheon with Salvatore Giuffrida, he had discussed the matters brought to him by

Avis (993). He also denied that he had mentioned a collection matter involving a woman (1092-93).

At several points appellant denied that he had ever had a discussion with Massaro or any other people from Avis about what he could do for Avis (929; 941; 944; 993; 1000).

ARGUMENT

POINT I

Appellant was not denied any constitutional right by the appointment of Justice Murtagh as the presiding judge for the Extraordinary Term.

Appellant Joseph Monty was tried before an Extraordinary Term of the New York State Supreme Court, which had been established in October, 1972, by executive order of the Governor of New York pursuant to the authority vested in him by Article VI, Section 27 of the New York State Constitution and Section 149(1) of the State Judiciary Law.* The Hon. John M. Murtagh, a Justice of the New

* Article VI, Section 27, of the N.Y. State Constitution provides, in relevant part: "The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the * * * justice who shall hold the term." Section 149(1) of the Judiciary Law parallels the constitutional provision.

The Extraordinary Term of Court was mandated by executive order to handle matters brought before it by the New York State Special Prosecutor's Office. 9A N.Y.C.R.R. §§1.61-65 (1972). The Special Prosecutor's Office had been created on September 19, 1972, by executive order of then Governor Nelson A. Rockefeller directing the Attorney General of New York to appoint a special deputy attorney general to supersede each of the District Attorneys in the five counties of New York City in all cases of corruption "arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York." 9A N.Y.C.R.R. §§1.55-59 (1972). Pursuant to this executive order, the New York Attorney General appointed Maurice H. Nadjari as a deputy attorney general and the Special State Prosecutor.

York State Supreme Court, was designated to preside over the Extraordinary Term.*

Appellant contends that "[t]he specific designation of a particular judge to try all the cases initiated by the Special Prosecutor is discriminatory and violates both due process and equal protection of the law under the Fourteenth Amendment." Appellant's Brief at 14.

Appellant's argument that his trial before the Extraordinary Term of Supreme Court denied him his constitutional rights of due process and equal protection of the law is wholly without merit. Indeed, appellant only expresses his argument in constitutional terms so as to gain access to the federal courts through the writ of habeas corpus. A searching examination of appellant's claim reveals that he is merely charging Justice Murtagh with bias.

While the Governor's appointment of a justice to hold an Extraordinary Term has never been challenged before in the federal courts, such power, as noted by the court below, has been exercised for more than half a century and has been squarely held by the New York Court of Appeals not to violate any right afforded by the United States Constitution. *People ex rel. Saranac Land & Timber Co.* v. *Supreme Court*, 220 N.Y. 487 (1917) (Cardozo, J.). *Saranac* has not been challenged or questioned by any court since it was decided in 1917.** Judge Judd, in his opinion

* Since the establishment of an Extraordinary Term in each of the five counties of the City of New York, 168 indictments have been returned by grand juries empanelled by these Terms and forty-seven defendants have been convicted of crimes in proceedings before these Terms.

** In a related but different context, the United States Supreme Court cited *Saranac* with approval in *Johnson* v. *Manhattan Railway Co.*, 289 U.S. 479, 501 n.15 (1933).

below, noted that the New York courts have consistently "sustained the exercise of jurisdiction of criminal cases at extraordinary terms, in a variety of circumstances." *United States ex rel. Monty* v. *McQuillan,* 385 F.Supp. 1308, 1310 (E.D.N.Y. 1974). Recently, in *People* v. *Davis,* 67 Misc. 2d 14 (Sup. Ct., Ontario Co. 1971), the court followed Judge Cardozo's decision in *Saranac* and forthrightly rejected the defendants' arguments that Section 149(1) of the Judiciary Law and Article VI, Section 27 of the New York Constitution were, on their face, unconstitutional. *See also People* v. *Gillette,* 191 N.Y. 107 (1908); *People ex rel. Luciano* v. *Murphy,* 160 Misc. 573 (County Ct., Clinton Co. 1936).

In the face of this constitutional and well established scheme concerning the designation of a special presiding judge for an Extraordinary Term, appellant attempts to interpose a local court rule regarding the assignment of judges. Appellant's Brief at 14-15. However, as the court below correctly pointed out, "[n]o authority is given for the suggestion that the Rules of the Supreme Court in a particular county would have greater weight than a provision of the state constitution." 385 F.Supp. at 1310. The New York Constitution obviously supersedes such local court rules insofar as such rules are in conflict with a constitutional provision.*

* Contrary to appellant's assertion, rules of court have the force and effect of statutes *only* when they are made under special statutory authority. *In re Moore,* 108 N.Y. 280 (1888) (Petitioner refused an exemption from Court of Appeals rule requiring proof that applicant for admission as attorney has passed the regents' examination.). It should also be noted that any "conflict" between the New York Constitution and local court rules is limited to the designation of the presiding judge. As the Court of Appeals pointed out in *Reynolds* v. *Cropsey,* 241 N.Y. 389, 395 (1925), the Extraordinary Term is "to be conducted in accordance with the rules of law governing all other terms of court with the exception of a designation of the judge."

Appellant, moreover, places undue weight on the purported "substantive" policies behind these rules of court administration. While the assignment of judges on a random basis is a commendable and wise rule of judicial administration, it is not a constitutional requirement. *See United States* v. *Simmons,* 476 F.2d 33 (9th Cir. 1973); *United States* v. *Torbert,* 496 F.2d 154 (9th Cir.), *cert. denied,* 95 S.Ct. 105 (1974); *United States* v. *Keane,* 375 F.Supp. 1201 (N.D. Ill. 1974). In *United States* v. *Simmons, supra,* the Ninth Circuit rejected a defendant's claim that he had an absolute right to the random selection of a judge. And, in a later decision, *United States* v. *Torbert, supra,* the Ninth Circuit made it clear that the local court rule providing for random selection was "a housekeeping rule for the internal operation of the district court which has a 'large measure of discretion in interpreting and applying' it" and that the local rule did not give a defendant "a vested right to any particular procedure." 496 F.2d at 157.

In *United States* v. *Keane, supra,* the defendant challenged the assignment of a specific judge to try the case. Instead of following the local court rule providing for the random assignment of judges, the chief judge of the district court utilized procedures implementing the October 29, 1971 resolution of the Judicial Conference of the United States, recommending a program for "the prompt disposition of protracted, difficult or widely publicized cases." Rejecting the defendant's challenge, the Executive Committee of the District Court for the Northern District of Illinois declared:

> "As the defendant concedes, due process does not accord him a right to have a judge assigned to his case on a random basis. Nor does it require a hearing on

the issue of whether defendant's case will be protracted, difficult or widely publicized.

Due process does require that criminal defendants be accorded a fair trial before an impartial judge. But a defendant has no vested right to have his case tried before any particular judge, nor does he have the right to determine the manner in which his case is assigned to a judge." 375 F. Supp. at 1204.

In an effort to distinguish *Keane, Simmons,* and *Torbert,* appellant raises for the first time on appeal the claim that "the appointment of a special prosecutor by the governor followed by the appointment of a specific judge by the same governor to hear the cases coming before the special prosecutor violates the principle of separation of power and checks and balances * * *." Appellant's Brief at 18. It is clear, however, that the Governor has no judicial function or influence in proceedings conducted before the Extraordinary Terms of Court. There is no evidence that the Governor who appointed this Extraordinary Term did so with any purpose other than that prescribed by the statute, *i.e.,* that the "public interest" required such action. Aside from the power to assign and remove the justice, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position, the Governor "has no power to do more," and he "has not attempted to do more." *People ex rel. Saranac Land & Timber Co.* v. *Supreme Court, supra* at 492. Indeed, in rejecting an identical claim made by the defendants in *People* v. *Davis, supra,* the court commented:

"If we were to accept the contention of the defendants that they are deprived of due process of law merely because there exists a possibility that someday, some-

> time a governor may appoint a judge to do his bidding in violation of law, then, we would logically have to conclude that the United States Constitution which empowers the President to appoint all members of the Federal Bench is similarly a violation of due process." 67 Misc. 2d at 16.*

Accordingly, the Governor's designation of a presiding justice for the Extraordinary Term is a well established and constitutionally permissible procedure which does not result in any unconstitutional discrimination against persons in appellant's position. In fact, it is difficult to even discern the alleged unconstitutional discrimination of which appellant complains.

It is well established that, under the equal protection clause of the Fourteenth Amendment, states are permitted to make distinctions between persons so long as these are not "unreasoned" (*Williams* v. *Oklahoma City*, 395 U.S. 458, 460 (1960)) or "invidious" (*Griffin* v. *Illinois*, 351 U.S. 12 (1956)). It is equally well established that state distinctions between persons are constitutionally valid if there is some legitimate state purpose for which the classification is made and if the classification reasonably serves the state purpose. *See, e.g., Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

New York's scheme concerning the appointment of a special presiding judge for an Extraordinary Term is both rational and justifiable in light of the vital and substantial state interests involved. The extremely sensitive nature of

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* Note that the power vested in the Governor by the New York Constitution is far more limited than the President's as the appointment for an Extraordinary Term is from the already duly elected members of the Supreme Court bench.

the investigations conducted by the Office of the Special State Prosecutor, some of which concern individual members of the state judiciary, requires that as few persons as possible know of on-going inquiries by the Office. The appointment of a special presiding judge for the Extraordinary Term serves to preserve the secrecy of such sensitive investigations.

Moreover, appellant's trial before a specially designated judge pursuant to state constitutional authority involves no "invidious" discrimination in violation of the United States Constitution.* Appellant makes no cogent argument in support of his claim that his trial before the Extraordinary Term subjected him to such "invidious" discrimination. In fact, there is no reasonable argument to be made that appellant would have fared any differently had he been tried before a Regular Term judge and a jury instead of before the Extraordinary Term and a jury. Certainly, the evidence overwhelmingly establishing his guilt of his crimes would have been the same had he been tried before a Regular Term judge and a jury. Moreover, evidentiary rulings and the charge to the jury (held by a unanimous Appellate Division to have been proper in the trial presided over by Justice Murtagh) would have been the same or substantially the same had appellant been tried before a Regular Term judge.

In sum, while appellant's trial before the Extraordinary Term may have been disparate from his trial before another

* Certainly, the instant situation bears no resemblance to the state procedures condemned by the Supreme Court in *Griffin* v. *Illinois*, *supra*, which, in practical effect, distinguished between criminal defendants on the basis of their relative wealth.

State Supreme Court justice, such disparity, if any, does not even remotely approach the sort of "prejudicial disparities" prohibited by the equal protection clause of the Fourteenth Amendment. *Williams* v. *Oklahoma City, supra.*

Indeed, as mentioned at the outset, while appellant expresses his argument in constitutional terms, in reality, he is merely charging Justice Murtagh with bias. Appellant has based his entire argument on the faulty premise that a judge designated to preside over an Extraordinary Term will necessarily be an unfair and pro-prosecution judge. Such reasoning is clearly unsupportable at law and under the instant facts.

It should be noted that all of the appellant's claims concerning Justice Murtagh's alleged actual bias on the trial were explicitly raised by him in his appeal before the Appellate Division, Second Department. Appellant's Brief before Appellate Division at 7-19.* Such claims were, however, soundly rejected by the Appellate Division in its unanimous affirmance of appellant's conviction. Similarly, the court below found that "[n]o substantial charge of actual bias" was made against Justice Murtagh and that the trial errors complained of did not support an application for habeas corpus. 385 F.Supp. at 1311.

Finally, the precedents and other materials involved in appellant's brief reveal the lack of any real merit in his appeal. Indeed, appellant cites *no* authority directly supporting his claim that his trial before a specifically desig-

* Appellee's answer to these claims is found in its brief before the Appellate Division at 25-33.

nated judge (and incidentally the trials of all the other defendants tried before the same designated judge) violated his constitutional rights. The court below went so far as to state that "[t]he precedents on which petitioner relies are strikingly dissimilar from this case." 385 F.Supp. at 1311. Appellant, for instance, cites *Tumey* v. *Ohio,* 273 U.S. 510 (1927), and *In re Murchison,* 349 U.S. 133 (1955), in support of his argument, yet neither decision has any real bearing on the instant procedures. In *Tumey* v. *Ohio,* the Supreme Court, faced with a situation where the trial judge would be paid for his service only when the defendant was convicted, quite naturally held that the judge's direct pecuniary interest in conviction denied defendants due process of law. *In re Murchison,* meanwhile, involved a Michigan statute which, in effect, authorized a judge to act as a "one-man grand jury." Under this statute the judge was able to interrogate, charge, try and convict the same person. Certainly, the instant procedures do not involve the extremes presented in *Murchison* and *Tumey.* In this same vein, appellant cites *Loper* v. *Beto,* 440 F.2d 934, 941 (5th Cir. 1971), *vacated,* 405 U.S. 473 (1972), for the proposition that equal protection includes "the right to be tried in the same manner as others accused of similar infractions." Yet *Loper* involved only the right to a hearing on a parole revocation. Loper's claim of a denial of equal protection was rejected by the Fifth Circuit and never passed on by the Supreme Court.

In sum, appellant's claim that his trial before the Extraordinary Term denied him constitutional rights is baseless, and, accordingly, the decision below denying his petition for a writ of habeas corpus should be affirmed.

POINT II

Appellant was not denied the Sixth Amendment right to confrontation by the admission of Fred Massaro's statements.

Appellant contends that the admission on his trial of certain statements of Fred Massaro* offered via other witnesses called by the prosecution constituted a violation of his Sixth Amendment right to confront witnesses against him.** Appellant's Brief at 26.

Appellant makes the astonishing claim that "proof as to the key element in the case, *i.e.*, an agreement or understanding to violate a lawful duty in return for special services, comes about *totally* from what Fred Massaro is alleged to have told other Avis officials * * *." Appellant's Brief at 25. (Emphasis added).

In fact, however, there was an overwhelming array of evidence, consisting of direct testimony by Avis personnel and extensive documentation conclusively establishing the corrupt relationship between Avis Rent-A-Car and appellant which was wholly independent of Massaro's statements.† Prominent in this evidence was a conversation

* Massaro, a fugitive in Florida, was unavailable to testify at the trial (1181-1185).

** It is significant that while the issue concerning Massaro's statements was raised by appellant in his post-trial motions before the trial court and his motion for reargument before the Appellate Division, it was not raised on appellant's direct appeal to the Appellate Division presumably because its utter lack of merit was quite apparent.

† In addition to direct evidence provided by the testimony of witnesses and documentation there was circumstantial evidence which established the criminal agreement between appellant and Avis. This circumstantial evidence is entirely independent of Massaro's statements. The evidence establishing beyond a reasonable doubt the existence of the agreement and understanding between appellant and Avis for free Avis cars in return for law enforcement services is analyzed at pp. 20-22 of Appellee's Brief before the Appellate Division.

between zone manager Salvatore Giuffrida and appellant in the summer of 1971. We reproduce this conversation in view of appellant's claim before this Court that his criminal understanding with Avis is based "totally" upon Fred Massaro's statements. Giuffrida testified that:

> "Monty specifically related to his past relationship with Avis Rent-A-Car and expressed a desire to continue that relationship, whereby he was helping us in different problems of collection, bad checks, placing alarms, and in return he was looking for a complimentary car which he had been given in the past." (Giuffrida, 367).

Contrary to appellant's claim concerning Massaro's statements, there are at issue basically only three conversations involving Massaro. One was between Massaro and Charles Napolitano; another was between Massaro and Richard Zaia; the last was between Massaro and Salvatore Giuffrida.

The first conversation consisted of testimony by Napolitano that Massaro told him that appellant was the Chief Investigator of the Queens District Attorney's Office and that he had been helpful to Avis in the past and could be in the future (133).

After this conversation with Massaro, Napolitano testified that he learned through his dircet contact with Avis documents and Monty himself that Monty was regularly receiving free cars, and that, in return for this Avis largesse, Monty played a role on behalf of Avis in the collection of bad debts (199-204).

The second conversation was one between Richard Zaia, an Avis employee, and Massaro concerning appellant's ability to cancel alarms for Avis (546). There was ample direct evidence, testimonial and documentary, independent of this conversation which established that Monty, in return for free Avis cars, was instrumental in cancelling stolen car alarms for Avis.

The final conversation consisted of testimony by Salvatore Giuffrida that in 1971, after Giuffrida had cancelled Monty's free Avis car, Massaro called him and urged him to reconsider this action, because Monty as chief investigator for the local district attorney had been and could continue to be helpful to Avis (360-361). This conversation was a mere prelude to testimony offered by Giuffrida of subsequent direct contact between him and Monty including a luncheon meeting at which Monty and Giuffrida explicitly agreed to the continuation of free cars for Monty provided he continue to render law enforcement services to Avis (367). The essence of the luncheon meeting conversation is set forth above, p. 27.

Testimony as to these statements of Massaro was clearly admissible, as the court below held, since they were statements of an accomplice or of a co-conspirator made in the furtherance of a criminal conspiracy.* This rule under which Massaro's statements were admissible, the co-conspirators exception to the hearsay rule, is well established in both federal and state law. *See* 4 Wigmore, Evidence §1079 (Chadbourn ed. 1972); Richardson, Evidence §244

* It should be noted that Massaro's statements were not admitted for their truth, but rather as the acts, conduct and statements of an accomplice of the defendant (131-32).

(10th ed. 1973). In fact, the proposed Federal Rules of Evidence, in Rule 801(d)(2), even recognize this established exception to the hearsay rule.

It is equally clear that the admission of Massaro's statements, the statements of a co-conspirator made in the course of a conspiracy, violates no constitutional right afforded appellant. In *Dutton* v. *Evans,* 400 U.S. 74 (1970), the Supreme Court held that the admission of a co-conspirator's declarations, though not made in the presence of the person against whom they were offered in evidence, did not violate the confrontation clause of the Sixth Amendment or the rule laid down in *Bruton* v. *United States,* 391 U.S. 123 (1968).

The decisions which appellant relies on, *Bruton* v. *United States, supra,* and *Pointer* v. *Texas,* 380 U.S. 400 (1965), simply do no support his claim. In the *Bruton* decision, the Supreme Court specifically noted that there was not before it "any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S., at 128 n.3. Moreover, the Court in the *Dutton* decision explained that *Bruton* and *Pointer* v. *Texas, supra,* had no application to a case involving the introduction of a co-conspirator's statements. 400 U.S. at 84-86.

Moreover, *United States* v. *Puco,* 476 F.2d 1099 (2d Cir. 1973), *cert. denied,* 414 U.S. 844 (1973), cited by appellant, has no applicability to the instant case and does not bar introduction of Massaro's statements into evidence. In *Puco,* this Court held that the declarations of the defen-

dant's co-conspirator were properly admitted. In the opinion on petition for rehearing, the Court set forth the relevant criteria concerning the admissibility of the declaration of a co-conspirator who does not testify at the trial:

> "* * * we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination * * *. In most cases the determination that a declaration is in the furtherance of the conspiracy—a determination that the trial judge now must make in every case for admissibility—will decide wl ether sufficient indicia of reliability were present. While there may be exceptions, we do not think that they will be frequent." 476 F.2d at 1107-1108.

By any standard of measurement, "sufficient indicia of reliability" were certainly present here so as to permit the introduction of Massaro's statements. First, the Massaro statements are sufficiently reliable for admission into evidence when they are gauged along with other evidence in the case. The testimony of Giuffrida alone concerning his luncheon conversation with appellant (see Appellee's Brief at 27) provides "sufficient indicia of reliability" of Massaro's statements.

Second, the Massaro statements meet the *Puco* test of reliability in that they were made in the furtherance of a conspiracy.

Finally, as an added basis of the reliability of the Massaro statements, we note that all were against Massaro's penal interest when made. *See United States* v. *Weber,* 437 F.2d 327, 340 (3rd Cir. 1970), *cert. denied,* 402 U.S. 932 (1971); *cf. United States* v. *Glasser,* 443 F.2d 994, 999 (2d Cir. 1971).

Appellant also relies on *Park* v. *Huff,* 493 F.2d 923 (5th Cir. 1974). Unfortunately for appellant, this decision was reversed on rehearing by the Fifth Circuit sitting *en banc.* 506 F.2d 849 (5th Cir. 1975). The Fifth Circuit, in its decision upon rehearing found "no collision" between the confrontation clause of the Sixth Amendment and the admission of the testimony of a co-conspirator. The court stated that the case, involving a murder plot, fell "clearly within the four corners of conspiracy cases frequently encountered in both state and federal courts in which the declarations of co-conspirators made during the existence and furtherance of the conspiracy are admissible as an exception to the hearsay rule." 506 F.2d at 857.

In sum, appellant was not denied the Sixth Amendment right to confrontation by the admission of Fred Massaro's statements

Conclusion

The order should be affirmed.

Respectfully submitted,

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Dated: New York, New York
April 9, 1975.

#4073

Affidavit of Service by Mail

In re:

United States ex rel. v. McQuillan

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on APR 11 1975, 197..., he served 3 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Spiros A. Tsimbinos, Esq.
125-10 Queens Blvd.
Kew Gardens, New York 11415

(Petitioner-Appellant)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 11th day of April 1975

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1977